18-2407-ag

United States Court of Appeals
for the Second Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GREEN APPLE SUPERMARKET OF JAMAICA, INC.,
Respondent.

On Appeal from the National Labor Relations Board

BRIEF FOR RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Green Apple Supermarket of Jamaica, Inc. hereby states that it is a nongovernmental corporate entity. Green Apple Supermarket of Jamaica, Inc. does not have any parent corporations or publicly owned companies that own 10% or more of Green Apple Supermarket of Jamaica, Inc.'s stock and Respondent is not a publicly held company.

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PRELIMINARY STATEMENT

Respondent Green Apple Supermarket of Jamaica, Inc. ("Respondent"), *by its undersigned counsel*, respectfully submits this brief in opposition to the Application for Enforcement of the decision and order of the National Labor Relations Board ("Board"). (A-__)(SPA-1).[1] As set forth herein, Respondent respectfully submits that the Board made a clearly erroneous decision in finding that Respondent committed any of unfair labor practices, which the decision is arbitrary and capricious. Specifically, the Board erred in finding that (i) Respondent discriminatorily disciplined and discharged Anthony Smith for his union and concerted activities in violation of Section 8(a)(3) and (1) of the Act and interfered with, restrained, and coerced Anthony Smith in the exercise of his rights guaranteed in Section 7 of the Act; (ii) Respondent discriminatorily disciplined and discharged Joel Tineo for his union and concerted activities in violation of Section 8(a)(3) and (1) of the Act and interfered with, restrained, and coerced Joel Tineo in the exercise of his rights guaranteed in Section 7 of the Act; (iii) Respondent threatened unit employees with termination and plant closure for their support of the Union and enforced stricter work rules on the unit employees in violation of Section 8(a)(3) and (1) of the Act; (iv) Respondent failed to notify and bargain with the Union regarding the unilateral implementation of written work schedules

[1] "A" refers to the Parties' Joint Appendix; "SPA" refers to the Special Appendix.

for the unit employees in violation of Section 8(5) and (1) of the Act; (5) Respondent refused and failed to timely provide the information requested by the Union that is necessary and relevant to perform its duties as the exclusive collective bargaining representative of the unit employees; and (6) The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent also respectfully submits that the ALJ made a clearly erroneous decision in issuing his *Bannon Mills* Sanction Order, where the General Counsel actually received the documents but failed to report to the ALJ, which the decision is arbitrary and capricious.

JURISDICTIONAL STATEMENT

Administrative Law Judge ("ALJ") Kenneth W. Chu rendered his original decision on October 19, 2017. On July 11, 2018, the National Labor Relations Board affirmed the ALJ decision. *See* 366 NLRB No. 124 (July 11, 2018). On December 28, 2018, the National Labor Relations Board filed an Application for Enforcement of the Board's Decision and Order. (A-__)(SPA-1). The matter was properly before the Board, and this Court has jurisdiction of this matter pursuant to Section 10(f) of the National Labor Relations Act, as amended. 29 U.S.C. § 160(f). Venue is appropriate in this Circuit under Section 10(f) of the Act, as the unfair labor practices in question were alleged to have been engaged within this Circuit.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether the Board's Decision and Order of July 11, 2018 is supported by substantial evidence on the record considered as a whole, consistent with the Act and in accordance with controlling Board and the Second Circuit's precedent, where the Board selectively considered evidence, ignoring that which was inconsistent with the conclusions of the Administrative Law Judge, where substantial evidence does not support the Board's Order under either the correct precedential standard or the vague criteria applied in the decision.

2. Whether the Board erred in finding that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by disparately implementing a new work schedule policy applicable to Unit employees, where substantial evidence did not support any finding that the disparate application of a new work schedule was a factor in the discharge of employees Joel Tineo and Anthony Smith Perez.

3. Whether the Board failed to implicate dual motivation analysis to see whether the employees Joel Tineo and Anthony Smith Perez's conduct exceeded the protection of the National Labor Relations Act, where substantial evidence would support a finding that the employees Joel Tineo and Anthony Smith Perez's conduct was not protected by the National Labor Relations Act.

4. Whether the Board erred in finding Respondent disciplined and discharged employees Joel Tineo and Anthony Smith Perez in violation of 8(a)(3) and (1) of the National Labor Relations Act for the unfair labor practices, where the employees Joel Tineo and Anthony Smith Perez's conduct exceeded the protection of the National Labor Relations Act, and where under long-established Board precedent, the employees Joel Tineo and Anthony Smith Perez's conduct was unprotected.

5. Whether the Board erred to order the Respondent to offer the employees Joel Tineo and Anthony Smith Perez "full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other employee emoluments, rights or privileges previously enjoyed, and to make them whole for any loss of earnings suffered as a result of the Respondent's unlawful actions against them", where the Board refused to consider the Respondent's financial hardship, and where Respondent went out of the business already without distribution of assets.

STATEMENT OF THE CASE

Respondent Green Apple Supermarket of Jamaica, Inc. operates a supermarket in Jamaica, New York. Respondent has a meat unit that has about 6 employees.

Joel Tineo admitted that he has been late to work frequently, sometimes two or three times per week. (SPA 25:18-19) (A- , at Tr. 469:21-470:2). Actually Joel Tineo was late to the Court on his Court date on April 28, 2017 for more than 20 minutes. (A- , at Tr. 435; 439:4-6). ALJ failed to note on the record that Joel Tineo was late on the Court date without good cause when all parties were waitinhg for him since 9:30 a.m. on that date. (*Id.* at 439).

Anthony Smith was discharged in January 2016 absent his union activities although he was recalled to work about 1 or 2 months later. (A- , at Tr. 337:14-19).

Anthony Smith has been late to work often. (A- , Tr. 401:1-402:5). Anthony Smith also failed to punch out twice during the lunch break, in violating the work rules and getting paid while not working. Nicholas Almarante Almengo observed that Anthony Smith came late to work since Nicholas Almarante Almengo started working there in 2015. (A- , at Tr. 535:17-18). Nicholas Almarante Almengo complained to Eric Peralta about Joel Tineo and Anthony Smith being late to work. (A- , at 542:24-543:9). Nicholas Almarante Almengo was called as the witness for the General Counsel's case in chief on May 2, 2017.

Actually, Anthony Smith and Joel Tineo were the only two employees who were constantly late to work. (A- , at 535:13-14).

Anthony Smith received and acknowledged the store policy and work schedule.

Joel Tineo received the store policy; but no signature in the Respondent's file about the store policy issued to Joel Tineo. Joel Tineo received and acknowledged his work schedule.

Anthony Smith is a friend to Eric Peralta. (A- , at Tr. 627:10-12). Eric Peralta has given Anthony Smith advice about his personal life. (*Id.* at 641:16-17). Eric Peralta shared his "personal thoughts" about the union with Anthony Smith. (*Id.* at 629:24-630:21).

Joel Tineo was not present during the election on June 24, 2016. (A- , at Tr. 529:6-15) (A- , at Tr. 769:12-15). It can be reasonably inferred that Joel Tineo did not vote for the Union so that he did not support the Union.

Although Joel Tineo was terminated by Respondent on July 20, 2016, Respondent reinstated Joel Tineo to work in his initial position. (A- , at Tr. 809:7-14) (GC Exh. 10) (R Exh. 5). After the reinstatement, Respondent continued to work until he voluntarily quitted job on August 15, 2016. (A- , at Tr. 812:2-815:8). Joel Tineo was not terminated by Respondent after he was reinstated. (*Id.*).

Other than Eric Peralta, no one from Respondent talked to Anthony Smith and/or Joel Tineo about Union.

Jesse did not speak English. Jesse did not speak to Eric Peralta about the union. Jesse did not speak to employees during the Captive Audience Meeting on June 24, 2016.

Despite the simple and straight forward facts, ALJ and the General Counsel tried to portrait Respondent as nasty antiunion employer engaging in unfair labor practices, although Respondent's actions were motivated by their legitimate business purposes to manage the supermarket.

SUMMARY OF ARGUMENT

The petition for enforcement should be denied as the decision below of the National Labor Relations Board (the "Board") was not supported by substantial evidence. As noted *supra*, there are effectively two component parts of this decision: the allegations with respect to Joel Tineo's separation from employment; the allegations with respect to Anthony Smith's separation from employment; and the allegations with respect to supposed unilateral changes to the terms and conditions of employment for Respondent's employees. Each of these allegations is without merit, and accordingly the petition should be denied in its entirety.

With respect to Joel Tineo's separation from employment, the decision below is flawed inasmuch as General Counsel has failed to demonstrate through substantial evidence that same was motivated by his Union activity. At most,

General Counsel demonstrated that Joel Tineo had previously been involved in Union activity.

However, it is apparent that it was not this activity, but rather Joel Tineo's failure to properly discharge his duties, which led to the cessation of his employment at Respondent. Indeed, there is no evidence that Tineo engaged in any protected activity at or about the time of his lawful termination. Moreover, Tineo had a long disciplinary history in his employment prior to his separation. Accordingly, it simply cannot be said that any of the circumstances surrounding the end of Tineo's tenure at Respondent warrant a finding of an unfair labor practice, and as such the petition should be denied.

Likewise, Anthony Smith also failed to properly discharge his duties, which let to the cessation of his employment at Respondent.

Finally, the allegations of unilateral changes in the terms and conditions of employment at Respondent are also not supported by substantial evidence.

Accordingly, as the decision below is not supported by substantial evidence in any respect, the petition to enforce same must be denied.

ARGUMENT

I. STANDARD OF REVIEW

Appellate review of a Board's decision "does not function as a mere 'rubber stamp.'" *Laborers' International Union of North America v. N.L.R.B.*, 945 F.2d

55, 58 (2d Cir. 1991). The applicable standard upon review is whether the Board's decision is supported by substantial evidence on the record considered as a whole, consistent with the Act and in accordance with controlling Board and judicial precedent.

"Factual findings of the Board will not be disturbed if they are supported by substantial evidence in light of the record as a whole." *N.L.R.B. v. Starbucks Corp.*, 679 F.3d 70, 77 (2d Cir. 2012) (quoting *N.L.R.B. v. Caval Tool Division, Chromalloy Gas Turbine Corp.,* 262 F.3d 184, 188 (2d Cir. 2001)). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* Legal conclusions "based upon the Board's expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference." *N.L.R.B. v. Caval Tool Division, Chromalloy Gas Turbine Corp.,* 262 F.3d at 188; *see Kinney Drugs v. N.L.R.B.,* 74 F.3d 1419, 1427 (2d Cir. 1996) (quoting *Local One, Amalgamated Lithographers of America v. N.L.R.B.,* 729 F.2d 172, 175 (2d Cir. 1984)). Such substantial evidence to be adequate must be "more than a mere scintilla." *Kinney Drugs v. N.L.R.B.,* 74 F.3d at 1427.

The Court engages in *de novo* review of the NLRB's application of the law to the facts in order to determine whether the Board's legal conclusions have a

reasonable basis in law. *See Beverly Enterprises., Inc. v. N.L.R.B.,* 139 F.3d 135, 140 (2d Cir. 1998), *AT & T v. N.L.R.B.,* 67 F.3d 446, 451 (2d Cir. 1995).

II. THE BOARD'S DECISION AND ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE WHERE THE BOARD SELECTIVELY CONSIDERED EVIDENCE

The Board's Decision and Order of July 11, 2018 is not supported by substantial evidence on the record considered as a whole, where the Board selectively considered evidence, ignoring that which was inconsistent with the conclusions of the Administrative Law Judge, in reach the finding of animus.

First of all, the Board refused to consider the Respondent's financial hardship before the Board adopted the ALJ's the finding of animus. (A-__, at Tr. 10:6-17:6.). The Board's failure to consider the Respondent's financial hardship when finding "the employer's asserted reason for the employee's discipline was pretextual" makes such finding clearly erroneous. (A-__) (SPA-1).

Respondent has met its burden of showing that the same action would have taken place even in the absence of protected conduct. *See Manno Electric, Inc.,* 321 N.L.R.B. 278, 280, fn. 12 (1996); *Farmer Brothers, Co.,* 303 N.L.R.B. 638, 649 (1991). Respondent's evidence of financial hardship, which would have been admitted, presents a legitimate reason for its action by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *See First National Maintenance Corp. v. N.L.R.B.,* 452 U.S.

666, 677 (1981); *Fibreboard Paper Products Corp. v. N.L.R.B.,* 379 U.S. 203, 223 (1964) (STEWART, J., concurring). "[A]n employer has the absolute right to terminate his entire business for any reason he pleases." *Textile Workers v. Darlington Co.,* 380 U.S. 263, 268 (1965). (A-___) (Respondent's income tax returns of 2015, 2016, and 2017 reveal that Respondent was in a losing track of business performance).

Furthermore, the ALJ's finding was only supported by selectively considered evidence that makes the Board's finding clearly erroneous:

1. The ALJ's Finding of Joel Tineo ("Tineo")'s Credibility was Clearly Erroneous.

The Board's Decision and Order adopted the ALJ's finding that, "[w]ith regard to Tineo, there is clearly no store policy that three tardiness violations would result in his discharge." (A-) (SPA-1). In this regard, the ALJ made a clearly erroneous credibility finding that, "I credit Tineo's testimony when he testified that he would call Perez when he would be arriving late to work and Perez had no problems with his late arrival", (*id.*), while Perez's testimonies directly contradicted the Tineo's testimony when Perez insisted that Tineo never called in when he failed to show up for work. (A-1, at Tr. 589-591). The ALJ's credibility finding upon Tineo is also compromised by the ALJ's failure to make the record of the Tineo's lateness to the hearing on April 28, 2017 when the hearing was supposed to start at 9:30 a.m. on April 28, 2017; but did not start until 9:50 a.m. on

April 28, 2017. (A-1, at Tr. 439; A-__, at Tr. 433.). Tineo's delay to the hearing on April 28, 2017 demonstrated that Tineo had no respect to any employer's requirement to arrive at work in time.

More shockingly, the ALJ failed to consider the full weight of testimony of the General Counsel's own witness, Nicholas Almarante Almengo, who testified that Tineo and Smith were the only two employees in the meat department of being late to work since he started to working there. (A-__, at Tr. 535:5-18.). Nicholas Almarante Almengo testified that Tineo would "always" be late since he came in to work. (A- , at Tr. 536:22-537:1.). Nicholas Almarante Almengo would complain to Erick Perelta that Tineo and Smith were late to work. (A- , at Tr. 543:4-9.). Nicholas Almarante Almengo testified that he was never late to come to work. (A- , at Tr. 543:1-3.).

Tineo also admitted that he had been late to work, sometimes two or three times per week. (A- , at Tr. 469:21-470:2). Tineo's conduct of being constantly late to work was also corroborated by the document evidence. (A- , GC 15; GC 16; GC 17). The General Counsel's hearing exhibits 15, 16, and 17 reveal that, Tineo "for not showing up to work, did not call in or leave any notice" (GC 15); "No Call, No Show" (GC 16); "After speaking to employee time after time he still shows up to work when he wants to and shows no interest in his work. Today, No Call No Show Again." (GC 17).

It has to be noted that plain English meaning of "late" as defined in Merriam-Webster is as follows:

> **a** (1) : coming or remaining after the due, usual, or proper time • a *late* spring • was *late* for class (2) : of, relating to, or imposed because of tardiness • had to pay a *late* fee.

<https://www.merriam-webster.com/dictionary/late>.

Therefore, late is late. Although the General Counsel attempted to portrait that "late" might not be so "late", late is late. A reasonable trier of fact does not need any other reference, such as work schedule, to find whether one was late to work after the one admitted he was late to work.

Furthermore, Tineo's discharge was also prompted by Tineo's refusal to follow the work order from the store manager. (A- , at Tr. 461:4-15.). Tineo testified that he would be fired when he refused to mop the floor in the grocery area. (*Id.*).

Accordingly, the substantial evidence in the record that Tineo had been repeatedly and habitually late to work during his employment and exhibited insubordinate conduct to the management with Respondent reveals that Respondent would have discharged Tineo anyway absent Tineo's protected union activities.

Furthermore, it is undisputed that Tineo did not participate in the voting and did not vote for the union. In this regard, it is clearly erroneous to infer that Tineo was active in the Union activities and supported the Union.

2. The ALJ's Finding of Anthony Smith ("Smith")'s Credibility was Clearly Erroneous

The Board's Decision and Order adopted the ALJ's finding that, "[w]ith regard to Smith, the Respondent did not provide credible evidence to document the incident that caused his discharge or that Smith had a work history of unsatisfactory performance." (A-) (SPA-1). The ALJ failed to give proper weight to the Perez's testimony that he received complaints from Smith and Almengo about Tineo's lateness and was told by them that it was "not fair to them because they always get more work whenever someone is late." (A-___, at Tr. 582-588).

The ALJ also failed to give proper weight to the Perez's testimony that Perez never gave Smith permission to work through his lunch breaks and the rule was that an employee could not work through lunch breaks. (A- . at Tr. 616:6-10.). It is not disputed that Smith received and acknowledged a copy of the store policy, which included the rule requiring all employees to punch out and in for their break times. (A- , at Tr. 381, 382; A- , GC Exh. 8a; GC Exh. 13a and b). Smith knew the policy that he could not work more than 6 hours continuously. (A- , at Tr. 365:13-21.). Smith knew the policy that he would have to punch out for 30

minutes when he worked continuously for 6 hours. (*Id.*). Smith understood the penalty for getting a write-up for violating the store policy. (A- , at Tr. 367:5-9.). Smith received two write-ups for violating the store policy for failure to clocking out on August 10, 2016 and August 11, 2016. (A- , GC Exh. 10 and 11.). Smith did not dispute the two write-ups for not clocking out after he went beyond the 6 hours of work. (A- , at Tr. 354:18-357:19.).

Smith understood the store policy that "there was a store policy on time and attendance specifically on arriving at work late". (A- , at Tr. 365:22-366:19.). He would receive a write-up for being late. (*Id.*). Smith received a write-up for being late on August 9, 2016. (A- , at Tr. 356:22-357:1; 357:21-358:5; GC Exh. 9.). Smith was also substantially late on August 15, 2016 when he was laid off on that day. (A- , at Tr. 358:21-22.).

Accordingly, the substantial evidence in the record that Smith had been repeatedly and habitually late to work during his employment and exhibited insubordinate conduct to follow the store policy with Respondent reveals that Respondent would have discharged Smith anyway absent Smith's protected union activities.

Therefore, Respondent submits to the Court that the Board, after adopting the ALJ's finding of facts and conclusion of law, has not established *a prima facie case* that Respondent's discharge of Tineo and Smith was substantially motivated

by Tineo and Smith's union activity, *if any*. Therefore, it is clearly erroneous for the Board to infer that Respondent possessed a general anti-union animus.

III. THE BOARD FAILED TO IMPLICATE DUAL MOTIVATION ANALYSIS, WHERE SUBSTANTIAL EVIDENCE WOULD SUPPORT A FINDING THAT THE EMPLOYEES JOEL TINEO AND ANTHONY SMITH'S CONDUCT EXCEEDED THE PROTECTION OF THE NATIONAL LABOR RELATIONS ACT

Respondent submits to the Board that the ALJ has misapplied the second step of the burden-shifting analysis. As noted, at that step the issue is whether Respondent would have fired employee Joel Tineo ("Tineo") or Anthony Smith ("Smith") absent his union activity.

"The lawfulness of [Tineo and Smith]'s discharge implicates dual motivation analysis." *N.LR.B. v. Starbucks Corp.*, 679 F.3d 70, 80 (2d Cir. 2012). "Initially, the General Counsel must establish a prima facie case that protected conduct was a motivating factor in the employer's decision to fire. The burden then shifts to the employer to show, as an affirmative defense, that the discharge would have occurred in any event and for valid reasons." *Id.* (quoting *National Labor Relations Board v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988)) (internal quotation marks omitted); *accord* , 251 N.L.R.B. 1083, 1089 (1980), *as clarified* by *Director, Office of Workers' Compensation Programs v. Greenwich Collieries,* 512 U.S. 267, 276-78, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994)).

Respondent did not discharge other employees in the Respondent's meat department after the union was set up. Only after Tineo and Smith's third disciplinary notice was they arguably terminated. This is hardly evidence of a discriminating employer set on eliminating its pro-union workforce. Accordingly, it simply cannot be said that General Counsel met its *prima facie* burden, and as such this Court should deny enforcement of the underlying order. To the contrary, there is ample evidence to demonstrate that Tineo and Smith were simply discharged for poor performance only.

Even assuming, *arguendo*, that this Court finds that General Counsel met its initial burden , it is clear that Respondent effectively rebutted same. , 251 N.L.R.B. 1083, 1089 (1980). Respondent has demonstrated above that it would have taken the same action regarding Tineo and Smith's misconduct even in the absence of their limited Union activity. *See Manno Electric,* 321 N.L.R.B. 278, 280, fn. 12 (1996); *North Fork Services Joint Venture,* 346 N.L.R.B. No. 092 (2006). The Board has consistently held that, where and employer disciplines or discharges an employee for violating company policy or for their work record and not for their union activities, no § 8(a)(3) violation will lie. *Airborne Freight Co.,* 343 N.L.R.B. No. 072 (2004) (employer established that it would have discharged employee because of seven legitimate warnings pertaining to intimidating a profane behavior in dealing with management, regardless of whether employee had

engaged in protected activity); *Overnite Transportation Co.,* 343 N.L.R.B. No. 134 (2004) (discharge of six union supporters who had failed to disclose criminal records on their job applications was lawful, since the Board found the employer had sufficiently demonstrated it would have discharged them even in the absence of their protected concerted conduct.).

As discussed at length above, Tineo had been repeatedly and habitually late to work during his employment and exhibited insubordinate conduct to the management with Respondent, all citing essentially the same or similar infractions for poor performance. Smith had been repeatedly and habitually late to work during his employment and exhibited insubordinate conduct to follow the store policy with Respondent. This is, plainly, an unacceptable disciplinary record for any employee, regardless of their Union membership. As the Board itself has previously held, "an employee's participation in protected concerted activity does not shield that employee from having to meet management's expectations." *Advanced Services, Inc.,* 2006 WL 2067932 (2006). Here, Tineo and Smith failed to satisfy management's expectations by coming to work in time and following the management's store policy and order. Coming to work in time was any employee's sole responsibility. Following the store policy was any employee's sole responsibility. Following job order of the management of the store was also any employee's sole responsibility. Tineo and Smith, however, have repeatedly

failed to satisfy their job responsibility. In light of this history, it is apparent that Respondent was justified in determining that Tineo and Smith's most recent misconduct was simply the final straw. In *Torrington Extend-A-Care Empl. Ass'n v N.L.R.B.,* 17 F.3d 580, 592 (2d Cir. 1994), this Court denied enforcement of a decision of the Board which found the termination of an employee to be an unfair labor practice. Although the employee in question had a lengthy disciplinary record, the Board still opted to find that the employee's termination was an unfair practice. (*Id.*) In reversing, this Court noted that "[w]e do not think that the Act allows second-guessing of an employer's decision to fire an employee with an extensive disciplinary record who seeks to avoid the consequences of her latest dereliction. . . ." *Id.* at 593. A similar rationale should prevail in the instant proceeding, inasmuch as Tineo and Smith were simply attempting to hide behind their Union membership to avoid the consequences of their utter failure to discharge their duties in a reasonable fashion.

Ultimately, Respondent has demonstrated that Tineo and Smith were terminated for their admitted insubordinate conduct, and for no other reason. Tineo admitted that he refused to mop the floor in the grocery area after he was told by the management to do so. Smith admitted that he violated the store policy mandating punching out after 6 hours continuous work. In no way was either Tineo or Smith singled out or otherwise discriminated against because of their

Union activity. It was insubordinate activity, and nothing more, which caused them to be discharged.

The Board itself has previously held that employees may lawfully be discharged for insubordination without running afoul of the standard. , 251 N.L.R.B. 1083, 1089 (1980). In *Davey Roofing, Inc.,* 341 N.L.R.B. No. 27, 2004 WL 342964, *1 (2004), the respondent employer had a policy in place which, upon the employees' failure to comply with same, resulted in their discharge for insubordination which was deemed an adequate reason by the Board. *Id.* at *4. *Davey Roofing* is especially relevant in that said employee's discharge for insubordination was lawful even though there were no comparable situations of similar insubordinate acts resulting in termination of other employees. *Id*. at *4.

Similarly, this Court has recognized that "even when an employee is engaged in protected activity, he or she may lose the protection of the Act by virtue of profane and insubordinate comments." *N.L.R.B. v Starbucks Corp*., 679 F.3d 70, 78 (2d Cir. 2012) (quoting *Verizon Wireless*, 349 N.L.R.B. 640, 642 (2007)). Thus, while "employees are permitted some leeway for impulsive behavior when engaging in concerted activity," this leeway must be "balanced against an employer's right to maintain order and respect in the workplace." *Id.* (internal quotation omitted). Here, however, there is no real suggestion that Tineo and Smith were actually engaged in any sort of protected or concerted activity when

they were habitually late to work and refused to follow store policy and work order when being disciplined for this conduct.

It is respectfully submitted that any employer would be justified in terminating an employee who acted in a similar manner to either Tineo or Smith, no matter that employee's disciplinary history. Accordingly, the underlying petition for enforcement should be denied with respect to Tineo or Smith's termination.

IV. THE BOARD ERRED TO ORDER RESPONDENT TO OFFER REMEDIES TO EMPLOYEES JOEL TINEO AND ANTHONY SMITH PEREZ, WHERE THE BOARD REFUSED TO CONSIDER THE RESPONDENT'S FINANCIAL HARDSHIP, AND WHERE RESPONDENT WENT OUT OF THE BUSINESS ALREADY WITHOUT DISTRIBUTION OF ASSETS

The Board erred to order Respondent to offer employees Joel Tineo and Anthony Smith Perez "full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other employee emoluments, rights or privileges previously enjoyed, and to make them whole for any loss of earnings suffered as a result of the Respondent's unlawful actions against them", where the Board refused to consider the Respondent's financial hardship, and where Respondent went out of the business already without distribution of assets.

The present case concerns a management decision whether to be in business at all "not in [itself] primarily about conditions of employment, though the effect

of the decision may be necessarily to terminate employment." *First National Maintenance Corp. v. N.L.R.B.,,* 452 U.S. 666, 677 (1981); *Fibreboard Paper Products Corp. v. N.L.R.B.,* 379 U.S. 203, 223 (1964) (STEWART, J., concurring). Although the decision to close out the store had a direct impact on employment, since jobs were inexorably eliminated by the termination, Respondent only had as its focus its financial hardship. (A-___). Respondent's income tax returns of 2015, 2016, and 2017 reveal that Respondent had sustained huge losses in its operation of the store. Although General Counsel made claim of antiunion animus, the facts in particular distinguish this case from the subcontracting issue presented in *Fibreboard. Fibreboard*, 379 U.S. at 223 (STEWART, J., concurring). Further, the union was selected as the bargaining representative or certified until well after Respondent's economic difficulties had begun. (A-) (Respondent's income tax return of 2015 reveals huge losses). Lastly, an employer has the absolute right to terminate his entire business for any reason he pleases. *Textile Workers v. Darlington Co.,* 380 U.S. 263, 268 (1965). Therefore, the Board's decision itself is not part of the § 8(d)'s "terms and conditions" over which Congress has mandated bargaining.

On the other hand, although Tineo was terminated by Respondent on July 20, 2016, Respondent reinstated Tineo to work in his initial position. (A- , at Tr. 809:7-14) (GC Exh. 10) (R Exh. 5). After the reinstatement, Respondent

continued to work until he voluntarily quitted job on August 15, 2016. (A- , at Tr. 812:2-815:8). Joel Tineo was not terminated by Respondent after he was reinstated. (*Id.*).

CONCLUSION

As for the reason set forth above, the Board's order and decision is not supported by substantial evidence in any respect, it is respectfully submitted that the petition to enforce same by General Counsel should be denied in its entirety, plus such other and further relief as this Court deems just and proper.

Dated: Flushing, New York
August 21, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

– X Docket No.: 18-2407-ag

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Green Apple Supermarket of Jamaica, Inc.,

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– X

CERTIFICATE OF SERVICE

I certify that on January 9, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I also certify that the foregoing was served on Petitioner *via* their counsels of record through the CM/ECF system as Petitioner's counsels are registered user.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

– X Docket No.: 18-2407-ag

National Labor Relations Board,

Petitioner,

v.

Green Apple Supermarket of Jamaica, Inc.,

Respondent.

– X

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), Appellants/Plaintiffs, *via their undersigned counsel*, certify that this motion and affirmation in support of the motion, *excluding the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, addendum containing statutes, rules, or regulations, and certificates of compliance or service, if any,* contains 5,107 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2001.

Dated: Flushing, New York
August 21, 2019

/s/ David Yan

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